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PLM II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-199837

DATE: November 10, 1980

MATTER OF: Master Sergeant Dwain R. Smith, ANG

DIGEST: A member of Ohio Air National Guard underwent surgery for a herniated disc by a civilian physician and asserts entitlement to disability continuation pay and allowances under 37 U.S.C. 204(h) but did not notify appropriate service authorities until after he was released by his civilian physician nearly 2 years after the injury. Where a member fails to notify appropriate service authorities thereby preventing them from making a contemporaneous investigation of the accident and injury, a determination of his disability and their interconnection, his right to pay and allowances during the period of his disability has not been established and will not be allowed. Compare 47 Comp. Gen. 716 (1968).

This action is in response to a request from Master Sergeant Dwain R. Smith, ANG, for further consideration of his claim for disability continuation pay and allowances believed due for the periods June 6 through June 19, 1977, and February 1 through May 19, 1978, incident to his service as a member of the Ohio Air National Guard.

This claim was the subject of a settlement by our Claims Group dated June 10, 1980, which disallowed it on the basis that he did not promptly report the accident and injury to appropriate service authorities nor did he comply with regulations requiring monthly certification of his continuing disability.

Sergeant Smith states that he could not promptly report the injury as he was unaware of its nature and extent until after the occurrence and it had been corrected. He also asserts that to deny payment is a disregard of the spirit of the law.

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The file shows that Sergeant Smith was performing annual training duty at Dover Air Force Base, Delaware, under 32 U.S.C. 503 during the period August 7-21, 1976. According to Sergeant Smith, he was assisting in the construction of an outdoor rifle range and either fell or was knocked from a ladder and hurt his back. Such injury as he sustained was apparently considered by him to be minimal, as he neither sought service medical assistance nor did he report the incident to appropriate service authority during the remainder of his duty period.

Sergeant Smith contends that following completion of his training duty and his return home, his back bothered him and got progressively worse. On November 16, 1976, he sought medical assistance from a civilian physician, who provisionally diagnosed it as a possible herniated disc. In June 1977, he was referred to a civilian neurosurgeon for consultation, and on June 10, 1977, he was hospitalized for 4 days for a diagnostic workup which confirmed the earlier provisional diagnosis. From June 14, 1977, until February 3, 1978, he apparently wore a back brace and on that latter date he was readmitted to the hospital where surgery was performed on his back.

The provisions of law governing entitlement to continuation of pay and allowances during periods of disability for members of the National Guard are contained in 37 U.S.C. 204(h). That subsection provides in part that such a member is entitled to pay and allowances as provided by law and regulation for members of the Regular Army and Regular Air Force whenever called or ordered to perform training under 32 U.S.C. 502-505--

"(2) for any period of time and is disabled in line of duty from injury while so employed."

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Regulations which implement this statutory provision are contained in the Department of Defense Military Pay and Allowance Entitlements Manual (DODPM) and administrative regulations issued by the service Secretaries.

Rule 1, Table 8-2-4 of the DODPM provides that if a member of a Reserve component is disabled as a result of an in-line-of-duty injury while serving on active duty for any period of time, he is entitled to active duty pay and allowances and medical benefits commensurate with members of the Regular forces so long as he is unfit for his normal military duties as determined by medical authorities. This rule also provides that such entitlement is not affected by the member's resumption of his normal civilian occupation; however, should the member fail to provide current and sufficient information regarding his disability, such failure may result in the discontinuation of disability pay and allowances.

In this regard, chapter 6 of Volume III of Air Force Manual 177-105, May 10, 1974, sets forth the requirement that documentation of a continuing disability for pay and allowance purposes shall be submitted monthly including medical certificates, which are to be reviewed to "ensure member is entitled to remain on disability continuation pay."

We have held that the member has the responsibility not only to promptly report his injury to service authorities, but also to report his current disability status from time to time so that proper action may be taken currently. In cases where the record fails to establish that the member promptly notified proper military authorities of the injury and kept them advised currently of his condition a basis for denial of pay and allowances may exist. 52 Comp. Gen. 99, 104 (1972).

In 47 Comp. Gen. 716 (1968), we held in a case involving a Reserve member who apparently suffered a

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physical disability as a result of an in-line-of-duty injury, but who failed to undergo the service-provided medical treatment he was directed to receive, that such failure on his part was sufficient to warrant termination of disability pay and allowances. In that connection, we stated at page 719 that:

"* * * We do not think that the Congress intended that non-Regular members should, by postponing treatment or examination * * * [be permitted] the continued payment of such compensation when the right thereto has not been clearly established * * *."

In decision B-195470, November 14, 1979, wherein we followed the ruling in 47 Comp. Gen. 716, we stated:

"* * * the member had an obligation to establish her disability status by traveling to the 910th TAC Clinic * * * each month if she expected to continue her entitlement to pay and allowances for incapacities. If she was unable to do so, she should have made other arrangements with Air Force authorities * * *."

In principle, we are unable to distinguish between cases where disability pay and allowances once started are appropriately terminated because members fail to continue to pursue required service procedures and cases where members fail to initially notify appropriate service authorities and provide them with any information as to an accident, injury and disability whereby contemporaneous service determinations can be made in the case.

According to the file, the first official notice that Sergeant Smith had a service connected accident, injury and disability, was given to service medical authority on June 12, 1978, when he completed a medical history report incident to his annual physical fitness

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certification. This was nearly 2 years after the accident and injury supposedly occurred and after he had been released by his civilian physician as able to perform light duty following surgery.

All service forms, and documents which are required to be prepared in connection with this type of case to show a service connected injury; that the circumstances surrounding an accident was in line of duty, not due to a member's misconduct; that the disabling condition is medically determined to have arisen as a result of the accident and the periods of a member's inability to perform military duty, were prepared in Sergeant Smith's case on and after February 12, 1979, and based almost totally, if not totally, on hearsay evidence. While Sergeant Smith contends that he was unable to promptly report his injury because he was unaware of its nature and extent until after it had been corrected, there is nothing in the file to show that he at any time during the 2-year period made any effort to inform the appropriate service authority that he had an accident while on training duty and injured himself, or that the condition provisionally diagnosed in November 1976 as a herniated disc and corrected by surgery in June 1977 was in any way related to an accidental injury sustained during a period of military service in 1976.

We recognize that injuries and resultant disabilities may not manifest themselves until after a member completes his ordered duty period. We also recognize that a service connected injury and disability may occur in circumstances which could require emergency treatment by civilian physicians and hospitals. However, where a member acquires knowledge of his condition in non-emergency circumstances and fails to notify appropriate service authorities for many months thereafter during which time the pertinent details of the accident, injury and disability could be contemporaneously determined without having to rely almost wholly on assumptions or suppositions, we do not feel that he has acted in a reasonable manner. Therefore,

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since appropriate service authorities were effectively prevented by the member from making a reasonable contemporaneous investigation of the indicated events of August 18, 1976, and his injury, a determination of his disability and their interconnection, it is our view that Sergeant Smith's right to receive disability continuation pay and allowances has not been established.

Accordingly, the action taken by our Claims Division disallowing the claim, is sustained.

Harry R. Van Cleave

For the Comptroller General
of the United States